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Ron Dougherty and Judith Dougherty, his wife v. California-Pacific Utlilities Company, a Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RON DOUGHERTY and JUDITH A. DOUGHERTY, his wife,

Plaintiffs and Respondents,

v.

CALIFORNIA-PACIFIC UTILITIES COMPANY, a corporation,

Defendant and Appellant.

Case No. 13854

APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY

HON. J. HARLAN BURNS, Judge

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In the Supreme Court

of the State of Utah

RON DOUGHERTY and JUDITH A. DOUGHERTY, his wife,	)	
Plaintiffs and Respondents,	)	
vs.	)	Case No. 13854
CALIFORNIA-PACIFIC UTILITIES COMPANY, a corporation,	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This case is one wherein the plaintiffs, Ron and Judith A. Dougherty, are seeking a money judgment against the defendant, California-Pacific Utilities Company, a public utility, for damages to plaintiffs' culinary well and to the basement of their home and for the cost of hauling culinary water to their home, all of which allegedly resulted from defendant's negligence in allowing water to overflow the banks of its canal during and following a severe rain and hailstorm.

DISPOSITION IN THE LOWER COURT

The trial court, sitting without a jury, granted

plaintiffs judgment against the defendant in the sum and amount of $896.27 and costs of court.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the trial Court's judgment on the grounds that the Court erred as follows:

1. In finding that defendant was negligent in the maintenance and operation of its canal;

2. In finding that there was no contributory negligence on the part of the plaintiffs; and

3. In finding that defendant's negligence proximately caused the damage complained of.

STATEMENT OF THE FACTS

Defendant, California-Pacific Utilities Company, a public utility, formerly Southern Utah Power Company, owns, operates and maintains a hydro electric generating plant known as hydro plant No. 2, hereinafter referred to as the hydro plant, located in close proximity to the Santa Clara River near Veyo, Washington County, Utah. The water used to propel the turbines of hydro plant No. 2 is taken out of the Santa Clara River at a point upstream from the Baker Reservoir and conveyed some 3 to 4 miles by means of the No. 2 hydro canal, hereinafter referred to as the canal, down to the hydro plant where it runs through the generating plant and eventually

back into the Santa Clara River (Tr. 7)*. Hydro canal No. 2 is also owned, operated and maintained by the defendant for the purposes aforesaid.

The canal was built in the year 1919 (Tr. 121) and has been in regular use since that date. It was originally constructed to accommodate the flow of 16 cubic feet per second of water. The canal had that same carrying capacity at the time of the damage complained of in this case, as it presently has (Tr. 6, 90, 96). In fact, the diversion works located at the head of the canal on the Santa Clara River are constructed in such a fashion as to automatically allow up to a maximum of 16 second feet of water to enter the canal (Tr. 91, 96).

The company's records indicate that since its construction the canal flow has varied from 5 to 16 second feet, depending, naturally, on the amount of water flowing down the Santa Clara River (Tr. 92). The maximum flow generally occurs in the spring, that is, March through April, while the minimum flow occurs in July and August (Tr. 92, 93). Although 30 second feet of water was originally appropriated by the defendant for power generating purposes, only 16 second feet has ever been diverted specifically through No. 2 hydro canal. Other portions of that total appropriation have been used, however, in other canals operated by the defendant (Tr. 95, 96).

To achieve the highest possible degree of efficiency in generating electricity, it is important that a constant amount

*Reference is hereby made to particular pages of the transcript of the trial.

of water pressure be maintained as the water from the canal reaches the generator (Tr. 10). To that end, the proper amount of water must be transmitted through the canal to a forebay which maintains the water at a constant volume and transmits it down a long steel pipe, known as the penstock, wherein the proper pressure is achieved by the time the water reaches the generator. At least four control devices aid in achieving the proper pressure and water volume required. The first device, already referred to above, is at the point of diversion from the river and automatically allows up to a maximum of 16 second feet of water into the canal. The second device, located some considerable distance upstream from the plaintiffs' property, is an overflow device and was installed above a certain point in the canal susceptible to ice jams. Said overflow permits water to escape from the canal at a point where no damage can be done in the event of an ice jam. On a very few occasions, the use of said overflow has been required (Tr. 11, 12, 24). The third device is located downstream from the plaintiffs' property and just above the forebay. It is constructed in such a fashion that a part of the device can be removed so as to allow all of the water to overflow harmlessly at that point in the event the screen in front of the penstock requires cleaning or if for some other reason it becomes desirable to prevent the flow of water into the generator. Said device also serves the vital function of keeping a constant volume of 16 second feet of water at the forebay (Tr. 23). In fact,

the canal is so designed that water will overflow automatically at said device (referred to as overflow No. 2 in the trial transcript) before backing up and overflowing at other places along the canal, including the vicinity of plaintiffs' property, if the fourth control device (infra) is completely shut off (Tr. 135, 159, 160).

The fourth control device is the nozzle at the end of the penstock. The nozzle can be shut off completely, but it can be opened only to one-third capacity, or to an approximate diameter of 10 inches (Tr. 99). As the volume of the water in the River and, consequently, in the canal decreases, such as in the late summer and fall, it is necessary to decrease the capacity of the nozzle accordingly to maintain the constant required pressure.

Prior to October, 1970, the plaintiffs had purchased approximately a half acre of land immediately east of the canal at a point approximately 2,000 feet upstream from and northeast of the forebay. The plaintiffs moved into a partially completed home, which they built on the property, sometime during the latter part of March, 1971. They also completed the drilling of a culinary well, which went into operation at about the same time. Both the house and the well of the plaintiffs were constructed at an elevation well below that of the portion of the canal adjacent to the plaintiffs' property. Plaintiffs were aware before they purchased the property that it was located on a down-hill slope from

the canal (Tr. 36, 37).

On August 8, 1971, a severe rain and hailstorm occurred in the area through which the canal flows. The storm was of such intensity that in a period of approximately two hours, it deposited one and seventy-two hundredths inches of precipitation in the general area of the canal (Tr. 15).

Upon receiving word of the occurrence of the severe storm, Ivan Hunt, hydro foreman for the defendant, rushed to the area. Upon arrival at the hydro plant, he noticed hail approximately three inches deep, heavy rains melting the hail, and great quantities of water flooding downhill and into the canal (Tr. 22, 23). As a result of the tremendous quantities of flood water running into the canal from the sloped area west of the canal, water overflowed the eastern bank of the canal for nearly the entire length of said bank from the overflow below the plaintiffs' property to Branham's place above plaintiffs' property -- a distance of approximately three-tenths to a quarter of a mile (Tr. 131). However, the bank itself remained intact (Tr. 131). The only three eyewitnesses to the storm who testified at the trial, Ivan Hunt, Elwin Hadley (both employees of defendant) and Ron Dougherty, all described the situation as "water running everywhere" (Tr. 41, 42, 129, 165).

Immediately prior to the beginning of the storm, the defendant, Ron Dougherty, left his home and went to Brookside, approximately one-half mile northeast of his house, to help a friend start his automobile. Ron Dougherty testified at trial that although the storm was of the same intensity at Brookside

as at his own home, he waited at Brookside for the storm to subside rather than returning to his own house immediately (Tr. 40). Even though he saw great quantities of flood water running to each side of the road and a considerable amount of hail still on the ground, he did not pay too much attention until he got home (Tr. 41). Despite the fact that his culinary well had lain open and exposed to the elements since late March of that year (a period of over four months), he "did not pay too much attention" (Tr. 44, 132, 133). Although Mr. Dougherty testified that one could expect severe storms in the area of his house, he had not yet gotten around to sealing and capping the casing of his well (Tr. 44). The casing was a perforated type casing, and as of the date of the storm, the area around the upper part of the casing had remained unfilled.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE DAMAGE COMPLAINED OF RESULTED FROM AN ACT OF GOD, NOT FROM DEFENDANT'S NEGLIGENCE.

(A) THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE STORM OCCURRING ON AUGUST 8, 1971, WAS AN UNPRECEDENTED ACT OF GOD, FOR WHOSE CONSEQUENCES THE DEFENDANT IS NOT RESPONSIBLE.

It is a well-settled rule of law in this state, as well as in most jurisdictions, that where a canal's overflowing occurs during a storm of such magnitude and severity as to be beyond the realm of reasonable foreseeability, and therefore beyond the ken of the traditional prudent man, negligence is non-existent

and no liability accrues against the owner of the canal for damages occurring to others by reason of such overflowing. Charvoz v. Bonneville Irr. Dist., 120 Utah 480 (1951), 235 P.2d 780; Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 P. 1009 (1898).

Ivan Hunt, the defendant's hydro foreman, who was born and raised in the area of the hydroplant and canal (Tr. 29), reported having never before seen a storm in that area of such severity and magnitude (Tr. 15, 22, 24, 129). He testified, in fact, that the canal had never before overflowed because of rain water flowing into the canal (Tr. 130). Ron Dougherty, one of the plaintiffs, testified that he could not remember a previous storm in the area delivering a combination of as much rain and hail (Tr. 42). Jacob Jones, a former employee of the defendant, whose testimony was the most antagonistic toward the defendant, and who did not witness the storm (Tr. 70), testified that in the 28 years he had worked along the canal he had never before seen flooding of the canal at Dougherty's place (Tr. 78).

The record shows that one and seventy-two hundredths inches of precipitation fell during a period of approximately two hours (Tr. 15). There is nothing particularly unusual about that amount of precipitation in that area during a 24-hour period. The unprecedented characteristic of that particular storm, however, is that so much precipitation fell during such a short period of time. If that amount of precipitation had come gradually, it would have been absorbed into the ground. However, under the instant circumstances, the ground could not begin to absorb that excessive quantity of precipitation (Tr. 23).

Courts can distinguish an ordinary flood or storm from an extraordinary one by determining whether its occurrence and magnitude should or might have been anticipated by a person of reasonable prudence in view of the flood and storm history of the locality involved and existing conditions affecting the liklihood of flooding. Wellman v. Kelley, 252 P.2d 816, (Oregon 1952). Defendant submits that based on the evidence in the record and the tests which courts apply in determining what constitutes an act of God, the instant storm and flooding were unforeseeable and constitute an act of God.

POINT I (B)

(B) THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING THAT DEFENDANT WAS NEGLIGENT IN ITS MAINTENANCE AND OPERATION OF ITS CANAL.

Utah stands for the proposition that an owner of a canal is not an insurer against damages caused to others by the overflow of the canal's banks, but that the owner is liable only if it is negligent in the maintenance or operation of the canal. Erickson v. Bennion, 28 Utah 2d 371, 503 P.2d 139 (1972); Big Cottonwood Tanner Ditch Co. v. Hyland Rlty, Inc., 8 Utah 2d 341, 334 P.2d 755 (1959). The trial court in the instant case made a finding that the failure of defendant's agent Ivan Hunt to reduce the volume of water in the canal by throwing open any or all of the control devices constitutes negligence of the defendant. However, the law imposes upon a defendant a duty to act only under such circumstances where the plaintiff can show by its proof that damage or harm occurs to the plaintiff as a result of defendant's failure to act. In the instant case, Ivan

Hunt testified that he had intended to open at least one control device, but was dissuaded by his judgment that the damage, if any, had already occurred and that his act of opening the device would avail little or nothing. The record is devoid of any evidence that even if, arguendo, the opening of all the control devices would have completely drained the canal, such acts of the defendant would have prevented the damage complained of. The plaintiffs have simply failed to carry their burden of showing that their damage resulted from acts or failure to act on the part of the defendant. Even if, arguendo, reasonable minds could not differ that the complete opening of all the control devices would have substantially reduced the volume of water in the canal, one cannot merely assume, under the circumstances and the proof in this case, that the defendant, therefore, caused the damage to the plaintiffs. To sustain such a conclusion of the trial court is to relieve the plaintiffs of their burden of persuasion and to impose upon the defendant a theory of strict liability or res ipsa loquitur, contrary to the law.

POINT II.

THE TRIAL COURT ERRED IN FAILING TO FIND THE PLAINTIFFS CONTRIBUTORILY NEGLIGENT.

On August 8, 1971, the defense of contributory negligence was still a valid defense under Utah law. The defense was not supplanted by the Comparative Negligence Act until the year 1973. Cf. Sections 78-27-37 to -43, U.C.A., (Supp. 1973).

The evidence is undisputed that the plaintiffs knew of the location of the canal and of the fact that their property was on

a lower elevation than the canal long before they purchased the property and constructed their house and culinary well (Tr. 36, 37). However, by Ron Dougherty's own testimony, it is clear that he did not allow for any danger as to the location of the house and well (Tr. 38). The evidence further shows that plaintiffs' culinary well was in operation for a period of some four months prior to the instant storm and flooding. Ron Dougherty testified that he was in the process of sealing the well, but that it had not yet been completed. He testified at the trial (Tr. 44) that one could expect serious storms in his area; however, he had made little or no effort in four months to protect his well from the elements. He further testified that he had been told that some previous flooding had occurred and that a neighbor's rock work under his trailer had been washed out thereby (Tr. 42). However, such a report apparently caused him no concern as the evidence shows that he left his well open and unsealed for four months' time.

On the day of the storm, despite the severity of the rainfall and hail which he observed and the heavy flooding which he saw, he lingered at a neighbor's house until the storm subsided, paying no attention to his house or well until he returned home (Tr. 41).

A recent Utah case, Erickson v. Bennion, cited supra, denied recovery to a plaintiff who failed to protect his home from flooding by run-off waters of the defendant. The court imposed a burden upon the plaintiff to provide a means of diversion of the flooding waters away from his own property. Although

the specific facts of the Erickson case and the instant case are not identical, the governing principles are. The plaintiffs in our case, by due diligence, could have prevented the injury to at least their well, which injury constitutes the substance of plaintiffs' complaint.

Both Ivan Hunt and Wallace Smith, defendant's agents, testified that on the day following the storm plaintiffs' well was open, unsealed and excavated below the level of the ground (Tr. 43-45, 94) and susceptible to rain and storm waters. Under all these circumstances, the trial court's failure to find the plaintiffs contributorily negligent is reversible error.

POINT III.

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S NEGLIGENCE PROXIMATELY CAUSED THE DAMAGE COMPLAINED OF.

The record fails to prove that it was, in fact, the water that overflowed the canal bank which caused the plaintiffs' injury, and not the torrential rain and hail storm itself. Had the canal not existed at all, the evidence is conclusive that the one and seventy-two hundredths inches of precipitation would have flowed toward the defendant's property in gushing quantities anyway. The plaintiffs' property, lying on a natural slope, would have been the natural recipient of ~~erroneous~~ enormous quantities of water during that period of approximately two hours that the storm lasted. A record devoid of such necessary evidence cannot support a bare finding that the defendant proximately caused the injury to the plaintiffs.

CONCLUSION

For the reasons stated herein, the appellant respectfully prays this Court to issue its order:

1. Reversing the trial court's finding that the defendant was negligent; or,

2. Directing the trial court to find the plaintiffs contributorily negligent; and,

3. Reversing the trial court's finding that the defendant proximately caused the damage complained of; and,

4. Reversing the judgment and decision of the trial court.

Respectfully submitted,

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